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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY GARCIA DELONNIE,

Defendant and Appellant.

E060233

(Super.Ct.No. FVI1102572)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed in part and reversed in part.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Arlene A. Sevidal and Elizabeth M. Carino, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant, Anthony Garcia Delonnie, of willful and deliberate attempted murder (Pen. Code, §§ 187, subd. (a), 664, subd. (a); count 1)¹ and street terrorism (§ 186.22, subd. (a); count 2). The jury found true allegations that defendant committed the offense in count 1 for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), that defendant personally used a firearm (§ 12022.53, subd. (b)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). The jury additionally determined that defendant personally used a firearm in the commission of count 2. (§ 12022.5, subd. (a).) In bifurcated proceedings, the trial court found true allegations that defendant had suffered two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subd. (a)), two serious felony prior convictions (§ 667, subd. (a)(1)), and four prison prior convictions (§ 667.5, subd. (b)). Defendant was sentenced to an aggregate term of 85 years to life in state prison.

In this appeal, defendant maintains insufficient evidence supports the jury's true finding on the gang enhancement allegation, as well as the street terrorism conviction in count 2. Defendant additionally raises claims of alleged instructional and sentencing errors relating to his street terrorism conviction.

As the Attorney General concedes, defendant's conviction in count 2 must be reversed for insufficiency of evidence based on the California Supreme Court's decision in *People v. Rodriguez* (2012) 55 Cal.4th 1125 (*Rodriguez*). We therefore need not

¹ All further statutory references will be to the Penal Code unless otherwise noted.

address the additional issues defendant asserts with respect to count 2. We reject defendant's remaining contention, and find that sufficient evidence supports the jury's true finding on the gang enhancement allegation. Accordingly, the judgment will be reversed as to count 2, and affirmed in all other respects.

I. FACTUAL BACKGROUND

On the evening of October 31, 2011, Julio Ramirez was at his friend Ashley's house in Apple Valley, along with Charles English (aka Tony) and several other friends. Defendant's brother-in-law, James, called English and said he wanted to speak to Ramirez. English offered to go with Ramirez to James's apartment in the Apple Valley flats while another friend, Jeremy Porter, drove them, and Ramirez agreed.

Earlier that evening, Christina Soriano had given defendant a ride to James's apartment. En route, Ramirez had called Soriano and asked to speak with defendant, but defendant refused to take the call. Ramirez told Soriano to tell defendant that he would pay him later. Ramirez owed defendant \$50 or \$60 "from getting his taxes done."

When Ramirez and English arrived at James's apartment complex, English told Ramirez to stay inside the car. English then walked towards defendant, who was standing in a garage. After a few minutes, English returned to the vehicle, accompanied by defendant. As English got back inside the car, defendant motioned for Ramirez to exit the vehicle. Ramirez was nervous because he thought defendant wanted to talk about the money Ramirez owed him, but he got out of the car and approached defendant.

Defendant placed his hand on Ramirez's shoulder, and they walked together for a few feet. Defendant suddenly pulled a gun from his waistband, and pointed it about a foot away from Ramirez's head and face. As defendant fired the gun, Ramirez blocked the shot with his left arm. Defendant's bullet went through Ramirez's forearm and into the side of his ribs. Ramirez ran to a nearby apartment where he collapsed on the front lawn. A neighbor called 911 at 9:30 p.m.

English told an officer that while he and Porter were in the car backing out of the driveway, they heard the sound of gunfire. Soon thereafter, defendant jumped into the backseat of the vehicle. English was upset because defendant was wearing a GPS ankle bracelet that could place them at the scene of the shooting. At 9:31 p.m., defendant fled the scene. Porter drove defendant and English to an automobile body shop.

Law enforcement officials interviewed Ramirez in the hospital while he was being treated for his gunshot wounds. Ramirez was crying and frightened throughout the initial interview. He was scared to identify his assailant because he was worried for his safety and the safety of his family from defendant and other gang members. Ramirez ultimately identified defendant as the shooter.

At trial, Deputy Tim Jackson of the San Bernardino County Sheriff's Department testified as the prosecution's gang expert. Defendant, known by his moniker "Goofy," is an active and self-admitted member of the Eastside Victoria (ESV) gang. Defendant has several tattoos, including the number 13, which signifies his allegiance to the Mexican Mafia.

ESV is a criminal street gang in Victorville, with approximately 200 documented members. ESV gang members commit crimes for revenue. ESV members take money from drug dealers in Victorville as a form of “taxes.” The gang’s primary activities include murder, attempted murder, aggravated assault, robbery, weapons possession, and drug sales. To establish the gang’s pattern of criminal activity, the People relied on eight predicate offenses committed by ESV members between 2002 and 2011.

Deputy Jackson testified that defendant’s attempted murder of Ramirez benefitted the ESV gang by enhancing the gang’s reputation for violence, and instilling fear and intimidation within the community. When a member carries a gun, the gang’s reputation for intimidation and fear increases, and the member’s standing in the gang is enhanced. Deputy Jackson opined that defendant’s crimes in this case were committed for the benefit of the ESV gang.

Defendant did not testify at trial, and the defense presented no affirmative evidence.

II. DISCUSSION

A. Applicable Law

We are limited in our review of a claim of insufficiency of the evidence. We assess the sufficiency of evidence by reviewing the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value, such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see

also *Jackson v. Virginia* (1979) 443 U.S. 307, 319-320; *People v. Albillar* (2010) 51 Cal.4th 47, 59-60.) “Given this court’s limited role on appeal, defendant bears an enormous burden in claiming there is insufficient evidence to sustain his . . . convictions. If the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves.” (*People v. Veale* (2008) 160 Cal.App.4th 40, 46 [Fourth Dist., Div. Two], citing *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Thompson* (2010) 49 Cal.4th 79, 113.) This standard also applies when determining whether the evidence is sufficient to sustain a jury finding on a gang enhancement. (*People v. Mendez* (2010) 188 Cal.App.4th 47, 56.)

In order to establish the truth of a gang benefit enhancement allegation under section 186.22, subdivision (b)(1), the evidence must show the following: “[F]irst, that the defendant committed a felony (a) for the benefit of, (b) at the direction of, or (c) in association with a criminal street gang; and second, that in connection with the felony, the defendant harbored the *specific intent* to (a) promote, (b) further, or (c) assist in any criminal conduct by gang members.” (*In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1358; accord, *People v. Gardeley* (1996) 14 Cal.4th 605, 616-617; *People v. Williams* (2009) 170 Cal.App.4th 587, 625 [Fourth Dist., Div. Two].) The prosecution may meet its burden of proving the gang enhancement allegation by presenting testimony from a gang expert. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 820; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.)

B. Insufficient Evidence Supports the Street Terrorism Conviction

Defendant initially contends insufficient evidence supports his street terrorism conviction in count 2. The Attorney General concedes that defendant's street terrorism conviction must be reversed based on the California Supreme Court's decision in *Rodriguez, supra*, 55 Cal.4th at pages 1132 through 1137. We agree.

The street terrorism substantive offense, section 186.22, subdivision (a), provides: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished . . . in the state prison for 16 months, or two or three years." There are three elements to the substantive street terrorism offense: (1) active participation in a criminal street gang; (2) knowledge the gang's members have engaged in a pattern of criminal gang activity; (3) willfully promoting, furthering, or assisting in any felonious criminal conduct by members of the gang. (*People v. Albillar, supra*, 51 Cal.4th at p. 56.)

In *Rodriguez*, the defendant acted alone in committing an attempted robbery. A jury convicted him of attempted robbery and active participation in a criminal street gang under section 186.22, subdivision (a). (*Rodriguez, supra*, 55 Cal.4th at p. 1129.) The issue in *Rodriguez*, like the issue here, was whether the third element of the crime described in section 186.22, subdivision (a)—willfully promoting, furthering or assisting in any felonious criminal conduct by members of the defendant's gang—is satisfied by

felonious criminal conduct committed by a defendant acting alone. (*Rodriguez, supra*, at p. 1129.) The court held that it is not, and expressly disapproved of prior cases to the extent they are inconsistent with the holding in *Rodriguez*. (*Id.* at p. 1137, fn. 8.)

As conceded by the People, *Rodriguez* controls the outcome of the issue here. Because the evidence at trial supports the conclusion that defendant was not with a fellow gang member² at the time of the attempted murder—the only crime the prosecution relied on to support the third element of the street terrorism charge—there is insufficient evidence to support the jury’s conviction of that offense. Accordingly, we reverse defendant’s conviction in count 2.³

C. *Sufficiency of Evidence for the Gang Enhancement*

Defendant contends insufficient evidence supports the jury’s true finding on the gang enhancement under section 186.22, subdivision (b)(1). According to defendant, the evidence was inadequate to support a finding that he committed the attempted murder for the benefit of, at the direction of, or in association with the ESV gang. Defendant also asserts there was insufficient evidence to show that he acted with the specific intent to promote, further or assist the criminal conduct of ESV gang members.

Section 186.22, subdivision (b)(1) provides that “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any

² No evidence was presented to show that either English or Porter, the men in defendant’s getaway vehicle, were members of any gang.

³ Because the conviction in count 2 is reversed, defendant’s additional claims related to this count have been rendered moot.

criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members,” shall receive additional punishment. The enhancement therefore has two prongs—the benefit prong and the intent prong. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 [Fourth Dist., Div. Two].)

Here, the prosecution’s gang expert, Deputy Jackson, testified that committing an attempted murder with a firearm benefitted defendant’s gang by enhancing its reputation among other gangs and instilling fear in the community. “Expert opinion that particular criminal conduct benefitted a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was ‘committed for the benefit of . . . a[] criminal street gang’” (*People v. Albillar, supra*, 51 Cal.4th at p. 63; see also *Rodriguez, supra*, 55 Cal.4th at pp. 1138-1139 [§ 186.22, subd. (b)(1) may apply to lone gang member who commits a gang-related crime].)

Deputy Jackson also testified that defendant’s gang, ESV, commits crimes for revenue, and that attempted murder is one of the gang’s primary activities. In this case, the evidence showed that the victim owed defendant \$50 or \$60, purportedly for “getting his taxes done.” The victim knew defendant was a member of the ESV gang, and feared him for that reason. The jury could have reasonably inferred that defendant shot the victim because he had failed to pay the money he owed to ESV, thereby instilling fear in other community members who might be perceived as owing the gang money in the future.

Based on Deputy Jackson's testimony, there was sufficient evidence to establish the "benefit" factor of the benefit/direction/association element of the gang enhancement. (See, e.g., *People v. Galvez* (2011) 195 Cal.App.4th 1253, 1261 ["The crimes were committed for the benefit of the gang because, as . . . explained by [the gang expert], the gang members' act of severely beating [the victim] in a public place . . . 'promotes fear, which, in essence, promotes their gang and their brutality to the community in which they live.'"]; see also *People v. Romero* (2006) 140 Cal.App.4th 15, 19 [sufficient evidence to support gang enhancement where expert testified that the shooting of any African-American men by a gang member would elevate the status of the shooter and their entire Latino gang].)

There is also sufficient evidence to establish that defendant committed the attempted murder with the specific intent to promote, further, or assist in criminal conduct by gang members. This element of the gang enhancement is satisfied even if the only gang member whose criminal conduct was furthered was the defendant himself in his commission of the underlying offense. (*People v. Hill* (2006) 142 Cal.App.4th 770, 774.)

In this case, Deputy Jackson testified the attempted murder benefitted the ESV gang by elevating the gang's status among other gangs and creating fear of the gang in the community. The more the community and other gangs feared ESV, the more crimes the gang could commit and the more revenue they could generate. By committing the attempted murder, defendant allowed his gang to more easily commit future crimes.

Thus, the jury could reasonably infer that defendant committed the crime with the specific intent to assist future criminal conduct by his fellow gang members. (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 353 [“A reasonable jury could infer . . . that appellant intended for the . . . murder to have the predicted effect of intimidating rival gang members and neighborhood residents, thus facilitating future crimes committed by himself and his fellow gang members.”].)

Based on the gang expert’s opinion and other evidence presented, we conclude substantial evidence supports the jury’s finding that defendant committed the attempted murder for the benefit of his gang, with the specific intent to promote, further or assist future criminal conduct by his fellow gang members.

III. DISPOSITION

The conviction for street terrorism in count 2 is reversed. In all other respects, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

KING
J.